Supreme Court, U.S.
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No. 94-2053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

v.

WILLIAM MURPHY, Acting Director, Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a federal court abstain under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971) from ordering state mental health officials to restore a previously-held grounds pass to an institutionalized person found not guilty by reason of insanity or to pay damages for the allegedly unconstitutional termination of the grounds pass where the sentencing court has statutory authority to oversee pass privileges and where proceedings were pending in state criminal court to determine the contours of the individual's pass privileges?

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on January 4, 1995 (App. A-1). The petitioners filed a timely petition for rehearing with suggestion for rehearing en banc, to which the respondents filed an answer pursuant to court order. The panel majority denied the petition for rehearing in a written addendum

to its decision on March 13, 1995, finding that no judge in active service voted for rehearing en banc (App. A-14). The Petition was filed in this Court on June 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioners

In 1981, the Circuit Court of Cook County, Illinois, Criminal Division ("the criminal court"), found Wayne Nelson not guilty of murder by reason of insanity (R. Doc. 16, exhibit A-4). In 1986, the criminal court found Anthony Manos not guilty of attempted murder by reason of insanity (R. Doc. 16, exhibit B-5). Both Nelson and Manos were ordered committed to a facility of the Illinois Department of Mental Health and Developmental Disabilities ("the Department") (R. Doc. 16, exhibits A-3 and B-4). On March 30, 1993, the Illinois Appellate Court ordered the circuit court to enter an order permitting the Elgin Mental Health Center to conditionally release Nelson. *People v. Nelson*, 244 Ill. App. 3d 356, 614 N.E.2d 277 (1st Dist. 1993). By order of the criminal court, Manos was released from Elgin in December of 1990 (Tr. 6-3-92, pp. 174-175, 196-201).

Illinois Statutory Provisions Governing The Criminal Court's Supervision of Persons Found Not Guilty By Reason of Insanity

The Illinois Unified Code of Corrections provides that after a finding of not guilty by reason of insanity, the defendant shall be ordered to the Department for an evaluation to determine whether he is subject to involun-

tary admission or in need of mental health services. 730 ILCS 5/5-2-4(a) (1994). The Department shall provide the court with a report of its evaluation within thirty days of the court's order. *Id.* If the defendant is found to be subject to involuntary admission or in need of mental health services on an inpatient care basis, the court shall order the defendant to the Department for placement in a secure setting. *Id.* Defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted or accompanied by Department personnel or with the prior approval of the court for unsupervised on-grounds privileges. *Id.*

During the period of commitment, the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges or unsupervised on-grounds privileges, except as provided by a treatment plan filed with the court. 730 ILCS 5/5-2-4(b) (1994). The facility director shall file such treatment plan with the court not more than thirty days after admission and every sixty days thereafter so long as the initial admission order remains in effect. *Id.*

Such plan shall include an evaluation of the defendant's progress and the extent to which he is benefitting from treatment. *Id.* Such plan may also include unsupervised on-grounds privileges and supervised or unsupervised off-grounds privileges, but only where such privileges have been approved by specific court order. *Id.* The court's order may include such conditions on the defendant as the court may deem appropriate and necessary to reasonably assure the defendant's satisfactory progress in treatment and the safety of the defendant and others. *Id.*

Criminal Court Proceedings Relating To The Pass Privileges of Nelson and Manos

In September 1988, Nelson petitioned the criminal court for unsupervised grounds passes at Elgin (R. Doc. 16, exhibit A-2). The criminal court granted Nelson's motion, allowing him to attend certain on-grounds programs at various days and times (*Id.*). The criminal court further ordered that Nelson's attendance at the programs be monitored, that no unsupervised on-grounds passes be given if Nelson failed to report promptly to each program or if any violent behavior was documented or if his medical records did not show that he took his medication, and that the criminal court be notified within one hour of any nonreporting to a program or to Nelson's unit (*Id.*).

In December 1988, the criminal court ordered that on-grounds unsupervised passes be allowed for Nelson with the proviso that on-grounds activities personnel report back to Nelson's unit when he arrives for the activity, that off-grounds supervised passes be allowed two times per month, and that Nelson not be allowed a home visit until further order of the criminal court (R. Doc. 16, exhibit A-1).

On January 22, 1988, the criminal court granted Manos's motion for an unsupervised on-grounds pass (R. Doc. 16, exhibit B-3). In July 1989, Manos filed a motion for unsupervised home visits and supervised off-grounds passes (R. Doc. 16, exhibit B-2). The criminal court ordered the Psychiatric Institute of Cook County to examine Manos to determine whether such visits and passes should be granted (*Id.*). In September 1989, the criminal court granted Manos's motion for supervised

off-grounds passes and denied his motion for home visits (R. Doc. 16, exhibit B-1).

In May 1990, two persons found not guilty by reason of insanity escaped from Elgin (Tr. 6-3-92, p. 218). On May 30, 1990, William Murphy, then the Acting Director of the Department, made the decision to suspend all passes for those persons at Elgin who were found not guilty by reason of insanity or who were found unfit to stand trial (Tr. 6-3-92, pp. 211, 221). Also on May 30, 1990, Nancy Foster, Director of Court Services at Elgin, telephoned the Chief Judge of the Circuit Court of Cook County to inform him of the suspension of passes (Tr. 6-4-92, pp. 452-457).

Roalda Alderman, facility director at Elgin, wrote to Judge John Manion at the criminal court regarding Nelson (R. Doc. 16, exhibit E). Alderman wrote a similar letter to Judge Jack Welfeld regarding Manos (*Id.*). The letters advised the court of the new procedure instituted for requesting grounds passes and revised clinical guidelines for determining whether a forensic recipient is clinically appropriate for pass privileges (*Id.*). The letters also stated that "we understand a hearing will now be scheduled for the purpose of resolving the grounds pass issue." (*Id.*). The letters asked the judges to send writs authorizing the Department to transport Nelson and Manos to the court (*Id.*).

Accompanying the letters were memorandums regarding the Department's new procedure for requesting grounds passes (R. Doc. 16, exhibit E, memorandums from Terry Brelje, then the Deputy Director for Southern Facility Operations and Special Programs, to circuit court judges). The new procedure consists of review of the treatment team's recommendation that a pass be

granted by a psychiatrist or psychologist, by the facility director, and by the director of forensic programs for the Department (*Id.*). The court then decides whether to approve a pass (*Id.*).

The explanation of the new procedure stated that "[t]he granting of a ground pass to a forensic recipient is a very critical responsibility that must simultaneously balance the needs to protect society and be responsible to the individual's clinical needs." (R. Doc. 16, exhibit E, memorandums from Brelje to circuit court judges). A pass for the simple purpose of being "on the campus" shall be granted only under the most carefully considered conditions and would be "relatively uncommon." (*Id.*). An on-grounds pass for the purpose of attending a program activity as part of the treatment plan "might be more commonly granted." (*Id.*).

The circuit court judges also were provided with a memorandum from Brelje notifying them of the administrative decision to temporarily restrict all forensic recipients' unsupervised grounds passes pending the construction of a security perimeter fence (R. Doc. 16, exhibit E, memorandum from Brelje to circuit court judges). The memorandum stated that the Department had made an administrative decision to build a perimeter fence to enclose the forensic buildings, the baseball field, and a significant area of open space (*Id.*). The judges also were informed that the recipients who are clinically approved for unsupervised grounds passes would have those passes restored upon completion of the fence (*Id.*). The memorandum also stated that such individuals, while unsupervised, will still be on grounds inside the perimeter fence and that until completion of the perimeter fence, the Department was of the opinion that the utilization of un-

supervised grounds passes by forensic recipients at Elgin presents an unacceptable danger, both to the individual recipients and the community at large (*Id.*).

On June 20, 1990, the treatment team reviewed Nelson's pass privileges and recommended that he be able to use his passes when appropriate structured activities are available to him in the future (R. Doc. 18, exhibit F, pp. 5-8). According to a letter from Nancy Foster, Director of Court Services at Elgin, to Stuart Katz, Nelson's attorney at the time, Nelson instructed Katz not to proceed with a court hearing in the matter of restoration of his pass privileges and that Nelson was "comfortable with" the Department's recommendation (R. Doc. 22, exhibit D; *see also* R. Doc. 24, exhibit E, affidavit of Nelson).

On June 15, 1990, the treatment team reviewed Manos's pass privileges and recommended that his privileges be reinstated with focus on unsupervised day passes and home visits with discharge as a goal (R. Doc. 18, exhibit G, pp. 2-5). On July 18, 1990, Alderman informed Brelje that she concurred with the review conducted by Manos's clinical team and non-treating professional staff that his pass privileges be reinstated in accordance with the memorandum regarding the fence enclosure of the Forensic Treatment Program (R. Doc. 18, exhibit G).

Circuit court hearings were held between July 1990 and October 1991 on the restoration of passes (Tr. 6-4-92, pp. 459-462). For example, on October 4, 1990, the court ordered Charles Bullock's on-grounds pass temporarily revoked for a period of ninety days (R. Doc. 22, exhibit C). The court also ordered that Cameil Britton's on-grounds pass be temporarily suspended until further

order of the court (*Id.*). The court denied the Department's motion to suspend Curtis Littrice's on-grounds pass and ordered Littrice to have a supervised off-grounds pass and an unsupervised on-grounds pass, which was subject to suspension if his behavior was not appropriate (*Id.*). The record also shows that the Department recommended that unsupervised pass privileges be reinstated for Charles Johnson, but that the implementation of such privileges be held in abeyance until the completion of the perimeter fence (R. Doc. 24, exhibit F).

On August 6, 1990, the temporary suspension of unsupervised off-grounds passes was lifted for those persons who were clinically approved to exercise this privilege (R. Doc. 16, exhibit D). After the passes were temporarily suspended, recipients of passes continued to engage in clinically appropriate activities outside of the Forensic Treatment Building, both on and off of the facility grounds (*Id.*).

On March 11, 1991, upon completion of the fence, on-grounds passes were restored (Tr. 6-4-92, p. 302). Forensic patients at Elgin can now use their unsupervised on-grounds passes for the purpose of moving from their housing unit to an activity in another building (Tr. 6-4-92, p. 304).

District Court Proceedings

On July 11, 1990, Nelson and Manos filed a complaint pursuant to 42 U.S.C. §§ 1983 and 1988 on behalf of themselves and others similarly situated (R. Doc. 1). They alleged that the defendants violated their due process rights by failing to provide them with an individualized determination as to whether they continued to

meet the standard for a pass, by failing to provide them with a hearing prior to the deprivation of their liberty, and by deciding to suspend the passes without evaluation by a qualified professional (R. Doc. 1, p. 6).

The plaintiffs sought an injunction directing the defendants to restore their on-grounds passes and off-grounds passes and to refrain from depriving them of their passes in the future in the absence of a hearing that complies with due process (R. Doc. 1, pp. 6, 8-9). They also sought monetary damages in the amount of $50,000 for each member of the class (R. Doc. 1, pp. 7-9).

In response to the plaintiffs' motion for a preliminary injunction for restoration of all passes that were suspended in May 1990, the defendants argued, *inter alia*, that the district court should abstain from exercising its jurisdiction (R. Doc. 10; R. Doc. 16, pp. 9-14). On July 23, 1993, the magistrate recommended partial summary judgment in favor of the defendants on the basis of qualified immunity (R. Doc. 95). The plaintiffs filed objections to the report and recommendation (R. Doc. 97).

On March 9, 1994, the district court issued an order dismissing the complaint without prejudice based on its decision to abstain from exercising jurisdiction under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (R. Docs. 98 and 99). The court denied on grounds of mootness the plaintiffs' motions for class certification and for a preliminary injunction (*Id.*).

Decision of the Court of Appeals

The panel majority affirmed the district court's decision to abstain; however, it concluded that abstention under the doctrine announced in *Younger v. Harris*, 401 U.S. 37

(1971) applied to this matter. 44 F.3d 497 (7th Cir. 1995). The majority noted that the staff at Elgin filed new treatment plans with the court for both Nelson and Manos every sixty days and that they could have opposed the implementation of the new plans on constitutional grounds in the state courts. 44 F.3d at 501. The majority found that the petitioners filed their federal court action rather than presenting their objections to the treatment plans. *Id.* Noting the petitioners' apparent dissatisfaction with the relief that state courts had given to other Elgin inmates, the majority stated that such dissatisfaction did not "justif[y] carting one's claim off to federal court." 44 F.3d at 502.

The majority found that the petitioners were trying to annul the result of treatment plans to which they made no objection in the state courts and that the petitioners did not claim that any of the *Younger* exceptions were applicable to the case. *Id.* The majority concluded that the petitioners had and did not use a state forum in which they could have presented the arguments presented in the federal court and that, under these circumstances, *Younger* was appropriate. *Id.* On March 13, 1995, the court denied the petition for rehearing. 44 F.3d at 504-505.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT MAJORITY PANEL CORRECTLY ABSTAINED FROM EXERCISING JURISDICTION BECAUSE THERE WERE ONGOING PROCEEDINGS IN THE STATE COURT IMPLICATING IMPORTANT STATE INTERESTS AND BECAUSE THE PROCEEDINGS AFFORDED THE PETITIONERS AN ADEQUATE OPPORTUNITY TO RAISE THEIR FEDERAL CONSTITUTIONAL CHALLENGES.

This matter is perfectly appropriate for abstention under the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). Based on principles of comity and federalism, the *Younger* doctrine applies when there are ongoing state judicial proceedings, where the state proceedings implicate important state interests, and where the state proceedings afford an adequate opportunity to raise federal constitutional challenges. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). This matter implicates the policies, interests, and conditions supporting *Younger* abstention, as the majority correctly concluded.

Under section 5-2-4 of the Unified Code of Corrections, a circuit court judge maintains jurisdiction over a person found not guilty by reason of insanity (NGRI) that he or she commits to an inpatient mental health facility. 730 ILCS 5/5-2-4 (1994). By statute, the treatment plan, which is filed with the circuit court every sixty days, includes an evaluation of the NGRI's progress and may also include unsupervised on-grounds privileges and off-grounds privileges, but only where such privileges have been approved by specific court order. 730 ILCS 5/5-2-4(b) (1994).

After the Petitioners' passes were temporarily suspended pending the completion of the fence at the Elgin Mental Health Center, the Department scheduled hearings before the criminal court judges for the explicit purpose of resolving the pass issue. As the Seventh Circuit majority found, "[n]o one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised in this litigation." *Nelson*, 44 F.3d at 501.

Where the statutory scheme grants the circuit court judges ongoing jurisdiction over pass privileges, where hearings were pending in the circuit court for the express purpose of resolving the pass issue, and where the Petitioners' arguments could have been presented in the state court proceedings, the majority correctly held that abstention was appropriate under the doctrine announced in *Younger*. The Petitioners have failed to show either that the majority decision requires review by the Court or that there are any conflicts between the Seventh Circuit and other circuits that need resolution by the Court. Under these circumstances, the petition should be denied.

A. The Pending State Proceedings Regarding Pass Privileges Involve Important State Interests.

In *Younger*, the Court held that principles of federalism and comity require district courts to abstain from granting relief whenever doing so would interfere substantially with ongoing state judicial criminal proceedings. 401 U.S. at 45. The *Younger* doctrine has expanded to include civil proceedings. *See Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975),

reh'g denied, 421 U.S. 971 (1975). Central to *Younger* is the recognition that ours is a system in which the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." 401 U.S. at 44. *Younger* reflects a strong policy against federal court interference in pending state judicial proceedings absent extraordinary circumstances. *Middlesex*, 457 U.S. at 431.

As the majority correctly stated, "[t]he principle of *Younger* is that a party to a state proceeding affecting important governmental interests must resolve the dispute in the state's preferred tribunal." *Nelson*, 44 F.3d at 501. The inquiry focuses on the importance of the generic proceedings to the State, not its interest in the outcome of a particular case. *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989). States have a substantial interest in enforcing criminal laws that bear a close relationship to criminal proceedings. *Huffman*, 420 U.S. at 604.

The majority panel noted that the "cases pending in the courts of Illinois are continuations of the original criminal prosecutions, and preserving a state's right to litigate criminal cases in its own courts is the core of the *Younger* doctrine." *Nelson*, 44 F.3d at 501. Contrary to the Petitioners' illogical contention, the majority's observation that the state proceedings are continuations of the original criminal prosecutions does not mean that the confinement of insanity acquitees is part of a scheme of punishment. (*See* Petition at 29-32). The majority's conclusion correctly recognized the fact that those persons found not guilty by reason of insanity are subject to the

criminal laws of Illinois. This point was made clear in *People v. Roush*, 101 Ill. 2d 355, 462 N.E.2d 468, 472 (1984), where the Illinois Supreme Court stated that "a circuit court judge maintains jurisdiction over an NGRI patient he or she commits to a mental institution." *See also People v. Valdez*, 79 Ill. 2d 74, 402 N.E.2d 187, 193 (1980) (provisions in the Unified Code outlining the circuit court's jurisdiction enable the circuit court to monitor the progress of the treatment being rendered by the Department to a person found not guilty by reason of insanity).

State judicial oversight of the treatment and confinement of NGRIs serves important governmental interests, and the Petitioners do not dispute this. Provisions of the Unified Code of Corrections, together with provisions of the Mental Health and Developmental Disabilities Code, make it clear that the purpose of the circuit court's ongoing jurisdiction is to help ensure both an NGRI's satisfactory progress in treatment and the safety of an NGRI and others. *See* 405 ILCS 5/3-814 (1994); 730 ILCS 5/5-2-4(b) (1994).

While an NGRI's treatment includes various components, the Illinois legislature has found that pass privileges are of such importance that it explicitly gave the circuit courts of Illinois ongoing jurisdiction over this aspect of treatment and confinement. Section 5-2-4 of the Unified Code states that during the period of confinement, "the defendant shall not be permitted to be in the community in any manner, including but not limited to off-ground privileges, with or without escort by personnel of the Department of Mental Health and Developmental Disabilities, unsupervised on-grounds privileges, discharge or conditional or temporary release except by a

plan provided in this Section." 730 ILCS 5/5-2-4(b) (1994). The facility director shall file with the court a treatment plan, which may include unsupervised on-grounds privileges and off-grounds privileges, but only where such privileges have been approved by specific court order. *Id.*

The Petitioners argue that *Younger* does not apply because they were not defendants in any pending state court proceeding. (Petition at 18-23). They ignore the facts of this case showing not only that the sentencing judge has ongoing jurisdiction over their pass privileges, but that the Department had scheduled hearings to resolve the pass issue that arose after passes were temporarily suspended.

The pending state court hearings were held in furtherance of enforcement of the Unified Code, which mandates that the facility director file treatment plans with the criminal court and that pass privileges can only be given by order of the court. In this regard, this matter is readily distinguishable from *Harris v. Pernsley*, 755 F.2d 338 (3rd Cir. 1985), *reh'g denied*, 758 F.2d 83, *cert. denied*, 474 U.S. 965 (1985), where no state criminal proceedings were pending. (*See* Petition at 18-19). The *Harris* court found that, although a civil case initiated by state prisoners was pending in the state court of common pleas involving issues similar to the federal suit, abstention was not appropriate because the government officials were not plaintiffs or prosecutors seeking vindication of state law enforcement policies in the state court action. Thus, because the state court action was not a criminal proceeding and did not involve state law enforcement policies, the *Harris* court concluded that the government's interest in the state action was not strong

enough to merit *Younger* abstention. 755 F.2d at 344. Here, on the other hand, the federal defendants' actions in the pending state court proceedings involved the state's interest in its law enforcement policies and furthered enforcement of the Unified Code of corrections.

The Petitioners' assertion that state proceedings were not pending is simply untrue. In addition to the statutory requirement that the Department file treatment plans with the circuit court sentencing judge every sixty days and the statutory mandate that only the circuit court can order pass privileges, the facts of this record show that hearings were indeed held beginning in July 1990 on pass privileges after passes were temporarily suspended in May 1990 due to the escape of two NGRIs from Elgin. When the decision to suspend passes was made, Department personnel immediately telephoned the Chief Judge of the Circuit Court of Cook County to inform him of the decision (Tr. 6-4-92, pp. 452-457). Thereafter, letters were written to criminal court judges advising them of the new procedures and guidelines applicable to the issuance of passes (R. Doc. 16, exhibit E). The letters also stated that "we understand a hearing will now be scheduled for the purpose of resolving the grounds pass issue." (*Id.*). The letters asked the judges to send writs authorizing the Department to transport Nelson and Manos to the court (*Id.*).

Federal court exercise of jurisdiction in this case would have constituted substantial interference with the pending state court proceedings. The consideration of *Younger* cannot be separated from the realities of this case. Although the Petitioners seem to have forgotten the relief they sought from the federal court, the facts show that they asked the federal court to order the defendants to

restore the pass privileges they had prior to the temporary suspension of passes. Had the district court granted the injunction, this order would have substantially interfered with the circuit court's ongoing statutory duty and authority to determine whether passes should be granted and to determine the perimeters of the passes. In this regard, this matter is clearly distinguishable from *Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), where the court rejected *Younger* without analysis, stating merely that the case "represents no interference or intervention in state judicial processes—criminal or otherwise." (*See* Petition at 23-24).

This Court has stated that the object of abstention is to "sustain '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own laws.' " *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). So long as challenges relate to pending state proceedings, proper respect for the ability of state courts to resclve federal questions presented in state court litigation mandates that the federal court stay its hand. *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Where pass privileges of NGRIs is a subject affecting important governmental interests and where the circuit courts of Illinois statutorily maintain ongoing jurisdiction over this aspect of treatment and confinement, the majority correctly applied the *Younger* doctrine under the facts of this case.

B. The Plaintiffs Had The Opportunity To Present Their Constitutional Claims In The Pending State Proceedings.

The facts of record make clear that the plaintiffs could have raised their constitutional claims regarding the suspension of old passes and the restrictions on new passes at the hearings held before the circuit court judges. "No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327 (1977).

There is a presumption that state courts are as capable as federal courts of guaranteeing federal rights. *See Swain v. Pressley*, 430 U.S. 372, 383 (1977) ("[E]lected judges of our state courts are fully competent to decide federal constitutional issues . . . ."). Thus, the *Younger* abstention doctrine does not become inapplicable simply because the plaintiff alleges federal constitutional violations. *Moore v. Sims*, 442 U.S. 415, 427 n.10 (1979). Plaintiffs "need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." *Juidice*, 430 U.S. at 337.

A federal plaintiff cannot escape *Younger's* reach merely by abandoning the pending state action and by failing to assert its state remedies in a timely manner. *Pennzoil*, 481 U.S. at 18 n.16. The burden of showing that there is no opportunity to raise constitutional claims in the state court rests with the federal plaintiff. *Moore*, 442 U.S. at 432. The Petitioners have never claimed that they could not have raised their constitutional claims in the state proceedings.

The Petitioners simply decided to bypass the opportunity that state courts allowed them to litigate these issues and chose instead to bring their claims into federal court. As the majority panel correctly noted, "the

Supreme Court long ago held that parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends." *Nelson*, 44 F.3d at 502 (citing *Huffman*, 420 U.S. at 607-611). The failure of the Petitioners to avail themselves of the opportunity to pursue their claims in the state proceedings does not mean that those proceedings were inadequate. *Juidice*, 430 U.S. at 337.

Contrary to the Petitioners' assertion, the majority's decision does not conflict with cases such as *Gerstein v. Pugh*, 420 U.S. 103 (1975) or *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 691 (1994), where the issues involved could not have been raised in the state proceedings and *Younger* then did not apply. (*See* Petition at 25-27, 32-35). In *Gerstein*, the Court found that the legality of the pretrial detention was an issue that could not be raised in defense of the criminal prosecution. 420 U.S. at 108 n.9. In *LaShawn A.*, the court found that family court proceedings did not present an appropriate forum for a multi-faceted class action challenge to the entire state foster care system. 990 F.2d at 1323. Here, on the other hand, the pending state proceedings, held for the purpose of determining the issue of pass privileges, gave the Petitioners an adequate, even a perfect, opportunity to raise the constitutional challenges that they raised in federal court.

The Petitioners' contention that the majority's decision is in conflict with *Coley v. Clinton*, 635 F.2d 1364 (8th Cir. 1980) is erroneous. (Petition at 34-35). In *Coley*, two former inmates of an Arkansas state hospital sought to represent a class of criminal defendants committed to the state hospital when found incompetent to stand trial or when acquitted by reason of mental disease. They alleged

constitutional violations relating to the procedures for commitment to and release from the state hospital and to the automatic confinement in a maximum security building.

The Petitioners fail to mention that the *Coley* court determined that abstention was compelled by *Younger* as to state judicial action involved in the commitment and release of criminal defendants. 635 F.2d at 1371. The court also found that abstention was proper under the doctrine announced in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941) as to the constitutional challenges to the administrative procedures for commitment and release. The court rejected the application of *Younger* for those claims relating to administrative procedures because there were no ongoing criminal court proceedings with which a challenge to state administrative inaction would have interfered. Here, on the other hand, there were ongoing proceedings in the Illinois criminal court governed by the Unified Code. The Petitioners fail to accurately present the *Coley* decision, and their argument that the majority's decision conflicts with *Coley* is simply untrue.

The majority noted that both Nelson and Manos have been released from confinement, but found that this fact did not mean that abstention was not applicable. *Nelson*, 44 F.3d at 502. The majority was correct. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *reh'g denied*, 421 U.S. 971 (1975), the Court found that *Younger* applied where a plaintiff attempts to annul the results of a state trial. The Court held that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies[,]" regardless of whether those rem-

edies continue to be available. *Huffman*, 420 U.S. at 609 and n.22; *see also O'Neill v. City of Philadelphia*, 32 F.3d 785 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1355 (1995) (a state proceeding is considered "pending" and *Younger* abstention proper where the adjudicatory process has become final as a result of the federal claimant's failure to pursue state court judicial review of an unfavorable state administrative determination).

The Petitioners distort the majority's decision by arguing that the court improperly imposed an exhaustion of remedies requirement on their case. (Petition at 27-28). The Petitioners appear to confuse exhaustion of state appellate remedies with the well-settled rule that a party bringing a section 1983 action need not exhaust state remedies. The majority noted the distinction between the concepts that the Petitioners confuse when it stated that an inmate participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent section 1983 action, but "[t]his is not at all to create an exhaustion requirement for conditions of confinement litigation under section 1983." *Nelson*, 44 F.3d at 502. There is no such requirement under *Felder v. Casey*, 487 U.S. 131 (1988) and *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Id.*

The principle expressed by the majority is consistent with this Court's views that a state's judicial system would not be accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the state's appellate courts. *Huffman*, 420 U.S. at 609. Thus, the *Huffman* Court concluded that the *Younger* standards may not be avoided "by simply failing to comply with the procedures

for perfecting [an] appeal[,]" and, in this regard, it was not essential to ascertain whether appellate remedies continued to be available. *Huffman*, 420 U.S. at 609 n.22. The majority noted the principle expressed in *Huffman* when it stated that "parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends." *Nelson*, 44 F.3d at 502. Contrary to the Petitioners' assertion, the majority's decision does not conflict with decisions of this Court.

The Petitioners have failed to ever argue that they did not have the opportunity to raise their constitutional challenges in the state court proceedings. Similarly, their petition fails to show that the majority panel erred in concluding that the opportunity existed for them to raise their claims. Under these circumstances and where the Petitioners have failed to show any conflict with other decisions, review of the majority's decision is not warranted.

II.

THE PETITIONERS' PREDICTIONS THAT THE SEVENTH CIRCUIT'S DECISION WILL PRODUCE DIRE AND WIDE-RANGING CONSEQUENCES ARE UNREALISTIC.

The Petitioners present their case to this Court as one involving generically "conditions of confinement" in order to bolster their assertion that this case will foreclose a federal forum to "thousands" of institutionalized persons across this country. (Petition at 35-42). They overstate the scope of the decision, and their presentation ignores the narrow factual context within which this case arose.

Inherent in the Seventh Circuit's decision is the recognition that a pass privilege is the only aspect of confinement that the Illinois legislature explicitly mentioned in the Unified Code as being subject to the criminal court's ongoing jurisdiction. The determination of whether an NGRI is given a pass and what restrictions will be placed on the pass is such a significant state interest that the Unified Code expressly provides that the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges or unsupervised on-grounds privileges, except as provided by a treatment plan filed with the court. 730 ILCS 5/5-2-4(b) (1994).

Not only are pass privileges the subject of treatment plans filed with the criminal court every sixty days, but here, in fact, hearings were pending for the very reason of resolving the pass privilege issue, the precise issue that the Petitioners brought in federal court. While other states may also provide for judicial supervision of certain institutionalized persons, that does not mean that the decision of the Seventh Circuit will effectively close the federal courthouse door to all persons confined to institutions in the United States, as the Petitioners suggest. The majority's decision is consistent with the principles announced in *Younger*, and it does not create a bar to federal litigation to all persons who are subject to the criminal or civil commitment laws of the states. The Petitioners' attempt to secure review by predicting unrealistic and drastic results must be rejected.

III.

THE SEVENTH CIRCUIT MAJORITY'S DECISION DID NOT APPLY, EXPAND, OR CONFLICT WITH *HECK v. HUMPHREY* BECAUSE THE PETITIONERS WERE NOT CHALLENGING THE FACT OR DURATION OF THEIR CONFINEMENT.

The Petitioners argue both that the Seventh Circuit majority improperly extended the holding of *Heck v. Humphrey*, ___ U.S. ___, 114 S. Ct. 2364 (1994) and that the majority's dismissal of the claim for damages conflicts with *Heck*. (Petition at 42-55). Neither of the inconsistent contentions made by the Petitioners is correct. In *Heck*, this Court held that in order to recover damages for an allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must show that the conviction or sentence has been reversed. 114 S. Ct. at 2372. When a state prisoner seeks damages in a section 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction and, if it would, must dismiss the complaint unless the plaintiff can show that the conviction has been invalidated. *Id.*

The Petitioners misread the majority's decision, which mentioned the holding of *Heck* and then noted simply that *Younger* supports a "complementary" holding for conditions of confinement that are actively supervised by state courts in that an inmate already participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent §1983 suit. *Nelson*, 44 F.3d at 502. The Petitioners contend that they are not challenging the

fact or duration of their confinement. (Petition at 51-52). No one, including the majority panel, disputes that. Moreover, nothing in the majority's discussion improperly applies, expands, or conflicts with *Heck*, contrary to the Petitioners' suggestion. The Petition should be denied.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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